Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

NORMAN E. HARPER,
Petitioner,

v.

JOAN E. HARPER,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTION PRESENTED

Did the state court's denial of the right of and opportunity for cross-examination by the defendant husband in a dissolution of a marriage proceeding deny his right to confrontation under the Sixth Amendment and his right to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

NORMAN E. HARPER,
Petitioner,

v.

JOAN E. HARPER,
Respondent.

Petition for Writ of Certiorari
to the Supreme Court of the
State of Oregon

Petitioner Norman E. Harper respectfully petitions for a writ of certiorari to review the judgment of the Oregon Supreme Court which denied review of the decision of the Oregon Court of Appeals.

OPINIONS BELOW

The opinion of the Oregon Court of Appeals appears at 122 Or. App. 9, ___ P.2d ____ (1993). (App. C). The Oregon Supreme Court's Order Denying Review is recorded at

318 Or. 246 ___ P.2d ___ (1993). (App. A). The effective date of the Appellate Judgment is January 19, 1994. (App. B).

JURISDICTION

The Order of the Oregon Supreme Court denying review was dated December 21, 1993, (App. A). Entry of the Appellate Judgment was on January 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides in relevant part, "nor shall any person * * * be deprived of life, liberty, or property, without due process of law;"

Amendment VI of the United States Constitution provides in relevant part, "In all criminal prosecutions, the accused shall

enjoy the right to * * * be confronted with the witnesses against him;"

Amendment XIV of the United States Constitution provides in relevant part, "No State shall * * * deprive any person of life, liberty, or property, without due process of law,"

STATEMENT OF THE CASE

This case is a proceeding for the dissolution of a 22-year marriage. The parties lived in Newberg, Oregon, during the majority of their marriage. They separated in April of 1990, when wife filed for divorce and served husband with a restraining order requiring husband not to enter the family home except with wife's permission.

Relevant Oregon law provides,

> "The dissolution of a marriage or a permanent or unlimited separation may be decreed when irreconcilable differences between the parties have caused the irremediable breakdown of the marriage." ORS 107.025 (1).

In an order by the trial court dated November 26, 1991, which reduced a pre-trial

ruling to writing, the court noted that a dispute between the attorneys had arisen during a pre-trial deposition when petitioner (wife) was asked to tell specifically what the irreconcilable differences were between her and her husband. Her attorney told her not to answer that question. The Court ordered:

> "* * * petitioner is directed to answer the question. That if the answer is that there are irreconcilable differences between the two of them and if she no longer desires to continue the marriage, then that constitutes an answer to the question. Respondent is not allowed to ask for specific details or specific reason(s)." (emphasis supplied). (Appendix D)

Adverse rulings need no exception in Oregon to preserve the issue for appeal (ORCP 59 H)[1] and the above ruling became the law of

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[1] - Oregon Rules of Civil Procedure 59 H (ORCP 59 H) provides in pertinent part:

"* * * It shall be unnecessary to note an exception in court to any other ruling made. All adverse rulings, including failure to give a requested instruction or a requested statement of issues, except those contained in instructions and statements of issues given, shall import an exception in favor of the party against whom the ruling was made."

the case. Cross-examination on these issues was thus cut off.

During the trial on direct examination, the petitioner (wife) was asked and answered as follows:

> Question: "And, in your view, are there irreconcilable differences between you and Mr. Harper to cause an irremediable breakdown in your marriage?"
>
> Answer: "Yes." (6/25/91 Tr 13).

This question of course was leading. On cross-examination she was further asked what she had previously said in her deposition. She answered,

> "I don't want to be married to this man anymore. And I'm not changing my mind." (6/25/91 Tr 77).

The wife did not make any other statement at all with reference to irreconcilable differences. She gave no information at all as to what those differences might be or why they were irreconcilable, nor why the resulting breakdown was irremediable.

Husband testified that he was not aware of any irreconcilable differences between himself and his wife. (6/26/91 Tr p. 75). Husband testified that he was opposed to divorce for religious reasons and that his wife shared the same religious affiliation. (6/26/91 Tr p. 78). Testimony from the husband, the teen-age children of the parties and the wife's brother was that these witnesses had not observed irreconcilable differences in the marriage. (6/26/91 Tr pp. 31, 37; 6/25/91 Tr. p. 124). (This was not a case involving paramours, extra-marital affairs or other "dirty linen," nor were there ever any such accusations, and therefore such would not have been a reason to prohibit cross-examination). Husband testified that his prime concern was reconciliation. (6/26/91 Tr p. 77-78).

The cross-examination issue was one of several issues discussed in the briefs of both parties before the Oregon Court of

Appeals. That Court rendered an opinion on the financial issues but did not address the denial of cross-examination. Husband's petition for review by the Oregon Supreme Court again raised the cross-examination issue but that Court declined to accept review.

REASONS FOR GRANTING THE WRIT

No-fault divorce laws like Oregon's exist in all or nearly all the states. Whether or not the states can prohibit cross-examination in a no-fault divorce proceeding has never been examined. This Court needs to give some guidance on the reach of the constitutional right of cross-examination in these cases, particularly where its exercise is not for exposing misconduct and could be an aid to reconciliation. This assumes of course that the public policy of the country should be to encourage reconciliation.

The trial court in this case prohibited inquiry via cross-examination into the

irreconcilability of the differences and heard no evidence on that subject.

Cross-examination has been recognized in previous decisions of both this Court and lower courts as part and parcel of the 6th Amendment right of confrontation and the 5th and 14th Amendment rights to due process of law. Usually these decisions are found in criminal cases. Some decisions have involved civil actions also. However there do not appear to be any cases dealing with the constitutional right to cross-examination in a divorce proceeding. To review some of the holdings concerning cross-examination:

> "The "Absence of cross examination 'calls into question the ultimate integrity of the fact finding process.'" Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed.2d 297 (1973).

> "Because of the historical and practical importance of the right of cross-examination, any limitations on this right (beyond the typical evidentiary rules limiting its scope to the subject matter of direct examination and to matters affecting witness credibility) * * * must be

justified by weighty considerations. [Citing Chambers v. Missippi]" United States v. Green, 670 F2d 1148, 1154, (D.C. Cir. 1981).

"A defendant's right to cross-examine fully the witnesses against him is one of constitutional dimensions, secured to federal defendants under the confrontation clause of the sixth amendment. Alford v. United States, 282 U.S. 687, 692, 51 S. Ct. 218, 75 L. Ed. 624; United States v. Morris, 5 Cir. 1973, 485 F2d 1385, 1386-87. State defendants have the right under the fourteenth amendment's due process clause. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). * * * " United States v. Mayer, 556 F2d 245 (5th Cir 1977).

"A substantial denial of the right of cross-examination without waiver is constitutional error which no amount of showing of want of prejudice will cure." Smith v. Illinois, 390 U.S. 129, 131, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968). See also Brookhart v. Janis, 384 U.S. 1, 3, 86 S. Ct. 1245, 16 L. Ed. 2d 314, 316 (1966).

"The question is not whether the refusal to permit the desired cross-examination was erroneous as an evidentiary matter, but whether it deprived appellant of a fundamentally fair trial in violation of the due process clause of the Fourteenth Amendment. See, Buchalter v. New York, 319 U.S. 427, 431, 63 S. Ct. 1129, 87 L. Ed. 1492 (1943). This court is not

required to find that the trial would have reached a different result had petitioner been allowed to carry out his line of impeachment. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); United States ex rel. Washington v. Vincent, 525 F2d 262 (2d Cir. 1975), cert. denied sub nom. Bombard, Correctional Superintendent v. Washington, 424 U.S. 934, 96 S. Ct. 1147, 47 L. Ed. 2d 341 (1976). It is sufficient for the granting of habeas corpus relief that the denial calls into question the ultimate integrity of the fact finding process. Berger v. California, 393 U.S. 314, 89 S. Ct. 540, 21 L. Ed. 2d 508 (1969)." Howard v. Olgiati, 435 F. Supp. 886 (W.D.N.Y. 1977)

"The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process' Dutton V. Evans, 400 U.S. 74, 89, 91 S. Ct. 210, 27 L. Ed. 2d 476 (1968). It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'" Pointer v. Texas, 380 U.S. 400, 405, 85 S. Ct. 1065, 13 L. Ed. 2d 923, (1965).

The Oregon Court of Appeals has recently restated Oregon's law concerning cross-examination, in State v. Halsey, 116 Or. App. 225, 226, 840 P.2d 730 (1992):

> "'It is axiomatic that a party against whom a witness is called has the right to cross examine the [witness].' *Best v. Tavenner*, 189 Or. 46, 53, 218 P.2d 471 (1950). 'The opportunity [for] cross-examination is an essential safeguard of the accuracy and completeness of testimony, and it is a right and not a mere privilege.' *Jones v. Siladic*, 52 Or. App. 807, 813, 629 P.2d 875 *rev den* 291 Or. 662 (1981). A trial court has some power to regulate cross-examination, *see, e.g.*, OEC 611; OEC 405, but it does not have the power wholly to deny the right to cross-examine.
>
> The error was not harmless.
> Reversed and remanded for a new trial." Halsey, supra, 116 Or. App. at 226.

When established rules such as the above cross-examination principles are not followed, a litigant's right to due process of law is violated. In Endicott-Johnson Corp v. Encyclopedia Press, 266 U.S. 285, 288, 45 S. Ct. 61, 69 L. Ed. 288 (1924) the United States Supreme Court stated:

> "The words 'due process of law,' when applied to judicial proceedings, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.' Pennoyer v. Neff, 95 U.S.

> 714, 733, 24 L. ed. 565, 572; Scott v. McNeal, 154 U.S. 34, 46, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108. They require a proceeding which, observing the general rules thus established, follows forms of law appropriate to the case and just to the parties to be affected; and which, whenever it is necessary for the protection of the parties, gives them an opportunity to be heard respecting the justice of the judgment sought. Hagar v. Reclamation Dist. 111 U.S. 701, 708, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663." Endicott-Johnson, supra, 266 U.S. at 288. See also Mannix v. Portland Telegram, 136 Or. 474, 490, 297 Pac. 350 (1930); Parker v. Gladden, 385 U.S. 363, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966); Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

Though the concept of fault is abolished in Oregon's domestic relations law, its core divorce statute still requires two elements: (1) the differences must be irreconcilable and (2) the resulting breakdown of the marriage must be irremediable. ORS 107.025 (1), supra. Cross-examination as to what the differences are, whether they are irreconcilable and whether they have resulted in an irremediable breakdown of the marriage *is not prohibited* by Oregon statute. Such

cross-examination is legitimate and should be guaranteed to divorce litigants as part of the federal constitutional guarantees of procedural due process and the right to confrontation.

In Alford v. United States, 282 U.S. 687, 692, 51 S. Ct. 218, 75 L. Ed. 624, (1931) the Supreme Court stated:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop."

In United States v. Lindstrom, 698 F2d 1154 the 11th Circuit stated:

> "Although a trial court should seek to prevent the disclosure of embarrassing, irrelevant information concerning a witness, it is an abuse of discretion to preclude defense counsel from obtaining relevant information, and the witness' privacy must yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case." United States v. Lindstrom, 698 F2d 1154 (11th Cir. 1983).

In Deitchman v. E.R. Squibb & Son, 740 F.2d 556, 561-62 (7th Cir. 1984), a civil case, the Court stated:

> "Certainly, Squibb is entitled to cross-examine plaintiffs' experts on the data underlying their opinions regarding DES. Fed. R.Evid. 703, 705. Cross-examination is a fundamental right that a court should only abridge to curb abuse. Alford v. United States, 282 U.S. 687, 691, 51 S. Ct. 218, 219, 75 L. Ed. 624 (1931); Union Automobile Indemnity Association v. Capitol Indemnity Insurance Co., 310 F2d 318, 321 (7th Cir. 1962). Although the scope of cross-examination is left to the discretion of the trial judge, where the circumstances are such that a restriction on cross-examination is so severe as to constitute a denial of the right, the particular restriction in question may constitute an abuse of discretion. See Reilly v. Pinkus, 338 U.S. 269, 275, up S. Ct. 110 113, 94 L. Ed. 63 (1949). * * *"

And the 5th Circuit stated:

> "'* * * it avails the government little to assert that the trial judge enjoys discretion in determining the bounds within which a witness must be cross-examined. '[W]hile the scope of cross-examination is within the discretion of the trial judge, this discretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment'. United States v. Bass, 5 Cir. 1974, 490 F2d

846, 858 n. 12. Accord United States v. Garrett, 6 Cir. 1976, 542 F2d 23, 25; United States v. Morris, 5 Cir. 1973, 485 F2d 1385, 1387. Because the district court did not allow the defense sufficient inquiry into the motivation of the prosecution's chief witnesses in testifying, and consequently frustrated Mayer's attempts to fully exercise his sixth amendment rights, the trial judge never reached the point at which he had the discretion to limit the extent of cross-examination." United States v. Mayer, 556 F.2d 245, 250 (5th Cir. 1977).

Protection against possible abuse of cross-examination has already been provided by the Oregon legislature:

"(2) The court shall not receive evidence of specific acts of misconduct, excepting where child custody is an issue and such evidence is relevant to that issue, or excepting at a hearing when the court finds such evidence necessary to prove irreconcilable differences." ORS 107.036 (2).

Husband here never sought cross-examination into the areas covered by this statute, only the wife's belief as to what the irreconcilable differences (unknown to him) were in her mind.

Petitioner contends that his interest in his marriage relationship and/or restoring or

rehabilitating it should be considered a protectable interest under the due process clauses of the 5th and 14th Amendments. See Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (freedom of personal choice in matters of family life is a fundamental liberty interest protected by the fourteenth amendment); Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (marriage and procreation are basic civil rights). See also Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 Law. Ed. 1942 (1922).[2]

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[2] - In Meyer v. Nebraska, the Supreme Court listed a number of our important civil rights that are protected by the due process clause:

> "The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. 'No state shall . . . deprive any person of life, liberty, or property, without due process of law.'
>
> While this Court has not attempted to define with exactness the liberty thus

Historically the common law recognized such an interest by granting a right of action in tort against an interloper for adultery with a spouse, or for alienation of affections or for loss of consortium (though in many jurisdictions these have more recently been abolished by statute). It is against this backdrop that petitioner asks the Supreme Court to grant the writ of certiorari and enforce the due process right of cross-examination in a contested divorce case. Petitioner was denied due process of law by foreclosing both cross-examination of what the 'irreconcilable' differences might

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guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (citations omitted)" 262 US at 398.

be as well as his presentation of any evidence of reconcilability and any opportunity to formulate and present a possible plan of reconciliation. Petitioner respectfully requests the Supreme Court to grant certiorari and remand the case to the Oregon courts to allow cross-examination and the presentation of evidence as above stated, and for reconsideration of the decree of dissolution in the light of the evidence thus developed.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Oregon Supreme Court and the Oregon Court of Appeals.

Respectfully Submitted,

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Appendix A

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Marriage of JOAN E. HARPER, Respondent - Cross-Appelant, Respondent and NORMAN E. HARPER, Appellant - Cross-Respondent. Petitioner	ORDER DENYING REVIEW CA A72485 SC S40615

The Court has considered the petition for review and orders that it be denied.

DATE: December 21, 1993.

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

COPIES TO:

MARK A JOHNSON Attorney for Respondent-Cross-Appellant Respondent

LAWRENCE J HALL Attorney for Appellant-Cross Respondent Petitioner

Appendix B

Filed: July 21, 1993

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of

JOAN E. HARPER,
Respondent - Cross-Appellant,
and

NORMAN E. HARPER,
Appellant - Cross-Respondent.

(DA90 0245; CA A72485)

Appeal from Circuit Court, Yamhill County, Charles E. Luukinen, Judge.

Kirsten E. Miller, Aloha, attorney for appellant - cross-respondent.

Mark A. Johnson, Portland, attorney for respondent - cross-appellant.

Before DeMuniz, Presiding Judge, Landau and Leeson Judges.

Landau, J.

Affirmed on appeal and cross appeal. No costs to either party.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent on appeal; cross-respondent on cross-appeal.
[X] No costs allowed. [ ] Costs allowed, payable by:

Appellate Judgment
Effective Date: January 19, 1994

COURT OF APPEALS
(seal)

APPELLATE JUDGMENT

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Marriage of
Joan E. HARPER,
Respondent - Cross-Appellant,
and
Norman E. HARPER,
Appellant - Cross-Respondent.
(D090 0245; CA A72485)

Appeal from Circuit Court, Yamhill County.

Charles E. Luukinen, Judge.

Argued and submitted January 25, 1993.

Kirsten E. Miller, Aloha, argued the cause for appellant - cross-respondent. With her on the briefs was Daniel E. McCabe, Aloha.

Mark A. Johnson, Portland, argued the cause for respondent - cross-appellant. With him on the brief were Jacqueline L. Koch and Gevurtz, Menashe, Larson, Kurshner & Yates, P.C., Portland.

Before De Muniz, Presiding Judge, and Landau and Leeson, Judges.

LANDAU, J.

Affirmed on appeal and cross-appeal. No costs to either party.

LANDAU, J.

Husband appeals from a judgment dissolving a 22-year marriage. He assigns error to, among other things, the trial court's division of property and its award of spousal and child support. Wife cross-appeals, assigning error to the trial court's denial of her costs and attorney fees. We review *de novo*, ORS 19.125(3), and affirm on both the appeal and the cross-appeal.

Husband is 47 years old. When the parties married, he was an assistant district attorney. A few years later, he opened his own law office in Newberg and has been practicing law there for more than 19 years. He testified that most of his clients have been from "the Christian community, referral from churches, church organizations." Although his annual income has been between $20,000 and $25,000 for the past six years, he does not believe that his law practice can be viable in the same community after the dissolution. He testified that he had only seven active cases and estimated his income to be less than $1,000 per month. An expert witness, who had evaluated husband's law practice, said that the business had once been doing well, but had become economically nonviable in recent months. He expressed serious doubts about husband's ability to sustain the law practice in the future. He testified that husband was qualified to work as an associate with a law firm or in a state agency, where he could earn $25,000 to $30,000 per year.[1]

Wife is 43 years old. She completed her degree in elementary education the year after the parties were married. After teaching for a couple of years, she became a housewife and mother. When the children were old enough to go to school, she worked part time for one year as a teacher in a private school. She then worked part time as a secretary for her church until 1990, when she obtained a full-time job as a receptionist in a doctor's office. Her teaching certificate has expired, and she would have to attend school for a short time to become recertified. However, she testified that a back injury has made her unable to teach elementary school again.

[1] Although husband complains that the witness was not an expert for the purpose of projecting husband's earning capacity, husband did not object to that testimony when it was offered and did not assign admission of the evidence as error on appeal.

She has considered returning to college for a master's degree in adult education.

The parties have two children: a daughter, age 18, and a son, age 15. Daughter was a sophomore in college at the time of trial. When she is not away at school, she lives with wife. Son lives with wife. The parties established a trust for the children's higher education. One-half was designated for each child. The value of the trust is difficult to ascertain with any certainty; no trust records are in evidence. Husband testified that the original amount of the trust corpus probably was about $45,000. An unspecified part of that, however, was based on the value of an account receivable in an apartment, which had not yet become due. Husband also testified that, at the time of trial, approximately $12,000 had been expended for daughter's educational expenses.

The trial court found that wife's monthly income from her employment is $1,445. It also found that, although husband was currently making less, he has the capacity to earn $2,500 per month. Based on those findings, it ordered husband to pay spousal support of $500 per month for 30 months, then $250 per month for five years. It calculated a presumed combined child support obligation of $424 and ordered husband to pay wife $212 per month for the support of their son, and to pay $212 per month directly to their daughter.

Husband first assigns error to the trial court's reliance on a finding of his earning capacity as a basis for the calculation of spousal support and child support awards. Husband argues that the trial court erred by relying on that finding, because there was no evidence that he was working less than full time or that he had decreased his income in bad faith. We disagree. ORS 107.105(1)(d)(D) provides that, in awarding spousal support, the court shall consider:

> "The earning capacity of each party, including educational background, training, employment skills and work experience."

Thus, the trial court was not required to find that husband was unemployed or underemployed in order to base its award of spousal support on earning capacity rather than actual

income. Similarly, in calculating a parent's income for determination of child support, the court must base the child support calculation on potential income, if a parent is unemployed or employed less than full time. OAR 137-50-360.[2] Nothing requires the court to find that the parent became underemployed in bad faith. In the light of husband's average annual income over the past six years and his occupational qualifications, we agree with the trial court's implicit finding that husband's present income is based on less than full-time employment, and we agree that his potential income is $2,500 per month.

Husband also argues that speculation about his potential income is "not allowed in this setting," because ORS 107.135 permits modification of spousal and child support if his financial circumstances improve. He is wrong. "We have never held that a court is precluded from forecasting a person's earning capacity" in order to determine an appropriate award of spousal support. *Furlong and Furlong*, 120 Or App 105, 108, 852 P2d 233 (1993). We hold that the court, likewise, is not precluded from forecasting a person's potential income as a basis for calculating an appropriate child support obligation.

Husband next assigns error to the trial court's award of child support without reference to the trust established by the parties for the children's higher education. He argues that the trial court should have considered the trust fund to be "other available resources of a parent," ORS 25.280, OAR 137-50-330(2)(a)(A), and that it should have found that the existence of the trust fund makes the presumed child support

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[2] OAR 137-50-360 provides:

"(1) If a parent is unemployed, employed on less than a full-time basis or there is no direct evidence of any income, child support shall be calculated based on a determination of potential income. For purposes of this determination, there shall be a rebuttable presumption that a parent can be gainfully employed on a full-time basis.

"(2) Determination of potential income shall be made according to one of two methods, as appropriate:

"(a) Determine employment potential and probable earnings level based on the parent's recent work history, occupational qualifications, or prevailing job opportunities and earnings levels in the community; or

"(b) Notwithstanding any other provision of this section, the amount of potential income attributed to a parent will not be less than full-time work (40 hours a week) at the current state minimum wage."

obligation unjust or inappropriate. OAR 130-50-330(2)(b).[3] He asks us to modify the judgment to require him to pay daughter only $200 per month, and he contends that those payments should begin only after her share of the trust fund is depleted, providing she is then still in school.[4]

The amount of child support that is presumed to be the correct amount under the guidelines may be modified if the court makes

> "a written finding or a specific finding on the record * * * that the [presumed] amount is unjust or inappropriate. * * * A new support amount may be calculated by determining an appropriate dollar value to be attributed to the specific criteria upon which the finding was based and by making an appropriate adjustment in the amounts used [for adjusted gross income and the basic child support obligation]." OAR 137-50-330(2)(b).

Among the factors the court may consider in determining whether an award is unjust or inappropriate are other available resources of the parent and the needs of the child. OAR 137-050-330(2)(a)(A), (G). Although the trust – at least as husband has characterized it – is not a resource of the parent, it may be considered an asset of the children. *Lawhorn and Lawhorn*, 119 Or App 225, 850 P2d 1126 (1993). Nevertheless, the child support award requires no modification. First, the evidence of the value of the trust is sketchy at best. Second, even if husband's estimates of the value of the trust are accurate, daughter's share is insufficient to meet even half of her educational costs that will have accrued by the time she is 21 years old. Third, daughter continues to live with mother when not attending school. Under the circumstances, we cannot say that the presumed child support obligation is unjust or inappropriate. The trial court's award is correct.

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[3] Husband also argues that the trial court could have "ratified the trust as a voluntary agreement by both parents for the higher education expenses of the children." That contention is raised for the first time on appeal and has not been preserved.

[4] He also contends that wife should also be required to make payments to daughter. That issue, even if it is construed as an assignment of error, was not raised or litigated below.

Husband's remaining assignments of error merit no discussion.

In her cross-appeal, wife assigns error to the trial court's "failure to consider evidence" of her attorney fees and costs. We review for an abuse of discretion. *Redler and Redler*, 112 Or App 203, 208, 827 P2d 1363 (1992).

Wife argues that husband should pay her attorney fees, because he is an attorney, he contested the dissolution, he was uncooperative and forced wife to seek court orders throughout the litigation, and he repeatedly discussed the case with non-parties. She also argues that husband's requests for a deposition and written closing arguments were intended to delay the proceeding and increase the expense of the litigation. The judgment provides that each party shall pay his or her own attorney fees.

The evidence shows that, immediately before husband was served notice of the action, wife withdrew $8,000 in cash from the parties' joint personal and business accounts, without husband's knowledge. She used $5,000 to pay attorney fees and used the balance for personal expenses. In addition, husband paid wife $6,800 for living expenses pending the dissolution. Husband was forced to obtain a commercial credit loan of $6,000 to meet his expenses. The trial court explained in its letter opinion that it based its decision on that evidence. The court did not abuse its discretion.

Affirmed on appeal and cross-appeal. No costs to either party.

Appendix D-1

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF YAMHILL

In the Matter of the Marriage of	)	
	)	No. DO 9002245
JOAN E. HARPER, Petitioner,	)	
	)	ORDER
and	)	
	)	
NORMAN E. HARPER, Respondent.	)	
	)	

THIS MATTER, coming before the court upon Motion of respondent by and through his attorney, JACK C. NULSEN, JR. and,

A dispute having occurred between the attorneys for petitioner and respondent when at the time of taking petitioners deposition, petitioner was asked to cite specifically what the irreconcilable differences were between petitioner and respondent whereupon her attorney, RODERICK A. BOUTIN instructed his client not to answer the question, and,

The Court being fully devised (sic) of the premises, it is HEREBY ORDERED ADJUDGED and DECREED that petitioner is directed to answer the question. That if the answer is that there are irreconcilable

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differences between the two of them and if she no longer desires to continue the marriage, then that constitutes an answer to the question. Respondent is not allowed to ask for specific details or specific reason(s).

IT IS FURTHER ORDERED ADFJUDGED (sic) and DECREED that petitioner shall give unto the respondent, the appraisal information concerning the real premises as owned by the parties.

Dated this 26th day of November, 1991.

/s/ Charles E. Luukinen
Circuit Court Judge

1 - Order

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